

LOWER VALLEY POWER & LIGHT, INC.

IBLA 83-755

Decided August 22, 1984

Appeal from decision of Area Manager, Pinedale Resource Area, Wyoming, Bureau of Land Management, denying powerline right-of-way application. W-74126.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Applications

BLM may properly reject an application for a powerline right-of-way crossing the Snake River pursuant to its discretion under sec. 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (1982), in the interest of preserving the scenic quality of the area and protecting raptors listed as endangered and threatened where the record shows the decision to be a reasoned analysis of the factors involved, including the availability of feasible alternatives, made with due regard for the public interest.

APPEARANCES: L. A. Bell, Jr., manager, engineering, Lower Valley Power & Light, Inc., for appellant; Henry C. Phibbs II, Esq., Jackson, Wyoming, for intervenors, Howard and Cara Stirn.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Lower Valley Power & Light, Inc., has appealed from a decision of the Area Manager, Pinedale Resource Area, Wyoming, Bureau of Land Management (BLM), dated June 1, 1983, denying its powerline right-of-way application, W-74126.

On February 11, 1981, appellant filed a right-of-way application for 1,900 feet of overhead powerline situated in secs. 20 and 21, T. 42 N., R. 116 W., sixth principal meridian, Teton County, Wyoming, pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1982). The powerline was intended to supply power to the area of the Jackson Hole Golf Course, including the Jackson Hole Airport, which is 9 miles north of the town of Jackson, Wyoming. Appellant stated in its application, at page 4, that it projected insufficient voltage in the area of the golf course "by 1982" from the existing Spring Gulch line. In order to meet this anticipated increased load, appellant outlined three options, all of which would satisfy the projected need. The first option involved building

1,900 feet of overhead line across the Snake River, on public land, and 1,800 feet of underground line across the Moulton Ranch, on private land. This 3,700 feet of new line would connect with existing lines which would be upgraded in capacity on both sides of the river and replaced with underground line on the west side of the river. This option would provide power from the Crystal Springs Substation, the closest substation to the golf course area. Appellant estimated the total cost of this option at \$232,590. The second option involved building 7.5 miles of underground line along the route of the existing Spring Gulch line from the Jackson No. 1 substation. Appellant estimated the total cost of this option at \$423,352.50. The third option involved increasing the voltage going through the existing Spring Gulch line by using a larger transformer at the Jackson No. 1 Substation in order to step-up the voltage and another transformer at the golf course area to step down the voltage to conform to existing line capacity. Appellant estimated the total cost of this option at \$446,068.75. Appellant selected the first option because it was the most economical method, provided an alternate feed to the golf course area thereby improving reliability of service, replaced existing overhead lines from the Crystal Springs Substation, and had lower overall maintenance costs because of the shorter distance involved. Id. at 11. Appellant also described the design and impact of the line crossing the Snake River in its application. Appellant stated that the line would be "nonreflective to minimize the visual impact" and would be strung over three 50-foot high poles, with spans of 550 feet and 20- to 30-foot clearance. Id. The poles would be topped with raptor perches. Appellant concluded that the major environmental impact of the line would be its visual impact:

The line will be 50 feet high and will be seen from some distance. It will not be visible to any major roadways, but it will be seen by those driving the levee and floating the river. The line will be marked with aerial cable markers (bright colored balls) if the BLM feels it is necessary to prevent collisions by birds, and/or aircraft flying along the river. The number of people that will see the line will be small compared to the number of people it will serve.

Id. at 11-12.

On May 25, 1983, a BLM realty specialist prepared a land report which addressed the environmental impact of appellant's proposed right-of-way on public land. The report concluded that the right-of-way would have "an adverse impact on the scenic quality of the area" and "increase the probability of a collision with wildlife species which our agency is mandated to protect under the Threatened and Endangered Species Act" (Recommendation/Rationale at 2). The report noted that the other options suggested by appellant would "alleviate voltage problems." Id.

The area of the Snake River which would be affected by appellant's proposed right-of-way is included in a 10-mile section of the river, which was part of a 50-mile segment of the river studied for possible designation as a wild and scenic river pursuant to the Wild and Scenic Rivers Act, 16 U.S.C. § 1271 (1982). The land report quoted from the final environmental statement (FES), entitled "Snake River-Wyoming, A Potential Wild and Scenic

River," dated September 1982, which described the 10-mile section of the river as follows:

This section begins at the south boundary of Grand Teton National Park and extends down-river ten miles to within 1.5 miles of the Wilson Bridge. The river environment is wide, including a series of shallow, braided channels surrounded by mature cottonwoods. Vegetated islands are common between the channels.

The presence of the levee system is visible occasionally to the floater as a flat-topped, gravel-faced river bank. In most cases, these levees are vegetated with forbs. Levees in this stretch have often been referred to as "good examples" of how they should be constructed in order to not create unacceptable visual impact. Most floaters do not recognize the structures as levees. Since the levee system is not continuous here and contains many gaps, the effect on river hydrology is not yet apparent.

An important resource in this section is the visual presence of the Teton Mountains. The stretch also includes outstandingly remarkable views as one floats along the base of timbered West Gros Ventre Butte.

Wildlife plays a vital role in this section's character. The stretch is just becoming known for its fishing attributes.

Waterfowl abounds the stretch as do moose, deer and elk. There are several osprey and bald eagle nests in this section.

Pastoral development along the river lends to the river character. Occasionally, the glimpse of a ranch house, barn or fence may register in the viewer's mind. Cattle or horses may also occasionally be seen grazing the river banks.^[1/]

(Recommendation/Rationale at 1-2). The report noted that the nonriparian land in the area of appellant's proposed crossing of the Snake River is privately

^{1/} The FES recommended that this 10-mile section of the Snake River, included in the upper 24.5 miles of the river, not be designated a wild and scenic river because of certain "management problems," primarily the need for continued maintenance of flood protection structures and bridge structures (FES at 9). In a June 11, 1982, letter to the President recommending a 13-mile section of the river for designation, the Secretary of Agriculture stated that the "entire river segment of 50 miles met the criteria for inclusion in the National Wild and Scenic Rivers System." The FES recommended, with respect to the portion of the river not recommended for designation, that the State and county "take action to assure maintenance of the existing recreational, scenic, wildlife, and fishery values" (FES at 8). This could be accomplished, the FES noted, through scenic easements, land use restrictions, and protective legislation. Appendix G of the FES contains a county planning document, entitled "Scenic Preservation Element," which assigned "highest

owned, on the east side by Merrill Moulton and on the west side by Howard Stirn. The public land in that area is used for grazing and recreation. In particular, the river is used to accommodate the "overflow" of commercial rafting trips (Land Report at 5).

The land report analyzed the impact of the proposed right-of-way on threatened and endangered animals as follows:

The Snake River is a commonly used travel lane for all types of wildlife. This is an area of high use by nesting and wintering bald eagles (Federal-Threatened).^[2/] The area is a known spring and fall migration corridor for peregrine falcons (Federal-Endangered). The area is also believed to be used by whooping cranes (Federal-Endangered). Other noteworthy users of the area are Canadian geese, ospreys and trumpeter swans.

In a letter dated March 11, 1981 to Mr. Donald R. Johnson (Lower Valley Power and Light) from Wally Steucke, U.S. Fish and Wildlife Service, Mr. Steucke makes the following statement, "Our information on the project and bald eagle use indicates that a may affect determination is warranted."

The biological assessment by BLM wildlife biologists Joe Lowe and Bruce Baker advised against powerline crossings of the Snake River.^[3/]

fn. 1 (continued)

priority" to the purchase of scenic easements in private lands in the Snake River flood plain. Appendix H of the FES is a statement, printed in the Congressional Record, by Senator Wallop of Wyoming introducing a bill, S. 2162, on Sept. 30, 1977, to establish the Jackson Hole Scenic Area, under which the Federal Government would purchase scenic easements, and a letter from the Teton County Board of County Commissioners, dated Sept. 7, 1977, supporting the proposed legislation. The record also indicates that the Federal Government is negotiating to obtain a scenic easement, W-79336, from a private landowner.

^{2/} The record indicates that there are two bald eagle nests in the vicinity of the proposed right-of-way, approximately 1 mile upriver and 2 miles downriver, and that a population of between 30 and 40 bald eagles (85 percent adults, 15 percent immatures) winter in the area.

^{3/} The biological assessment at pages 2-3, noted that the potential impact on bald eagles and waterfowl included "mortality due to collisions with lines and disturbance of habitat." The biological assessment also stated at page 3:

"Collisions of eagles with powerlines have been documented in several papers (Coon, et al., 1970; Beecham and Kochert, 1975; Belisle, et al., 1972; Mulhern, et al., 1970). Mortality data for immature and adult bald eagles indicate that about 10 percent of the known deaths from 1960 to 1972 resulted from impact injuries, many from collisions with powerlines (Kroodsma, 1978). Kroodsma also stated that the effect of disturbances caused by the presence of powerlines in important habitats would probably be more critical in breeding areas than in non-breeding areas. Although eagles have good vision and should be able to avoid wires when visible, many will get into trouble when occupied with hunting, landing, or other members of their own species. Young birds

A formal Section 7 Consultation was requested from the U.S. Fish and Wildlife Service. In the official memorandum dated July 14, 1982, they stated that the proposed crossing would not jeopardize the continued existence of the bald eagle and peregrine falcon.^[4/] However, in their recommendation statement they stated the two alternatives were biologically superior since impacts were minimized or avoided.

In a letter to Mr. Don Johnson (Lower Valley Power and Light), the Wyoming Game and Fish Department recommends an alternative route be selected because the proposed action may cause significant losses due to bird collisions. The letter continues to point out that there have been two trumpeter swan deaths near Jackson due to collisions with power lines. The trumpeter swan is officially designated as an uncommon species of high interest. The state's priority concerning the trumpeter swan is to increase the population.

In a letter to John Rakowski dated August 7, 1981, Mr. Morlan W. Nelson feels powerline collision is not a significant problem but it can happen.^[5/] Mr. Nelson also raises an interesting point in that it is difficult to say whether the dead birds found hit wires, twigs, telephone lines or what. Copies of all letters are attached.

Aerial cable markers (bright colored balls) would probably minimize the likelihood of a collision.

Other mitigating measures, i.e., raptor perches, timing of construction and route selection should minimize possible effects on wildlife. [Emphasis in original.]

(Environmental Assessment at 2-3). In a letter to the Fish and Wildlife Service (FWS), dated April 8, 1981, the Rural Electrification Administration

fn. 3 (continued)

may be particularly vulnerable to wire strikes as they haven't developed the skills necessary to negotiate obstacles."

^{4/} FWS stated that the powerline crossing the Snake River would "slightly increase the probability of collision with the new powerlines by bald eagles and falcons, especially fledgling and immature individuals, and during strong winds and poor light conditions (Steenhof 1978). Certain construction activities may impact eagle behavior during the courtship, egg laying, and early incubation period. Removal of vegetation near the river reduces the amount of habitat available to these raptors and to bird life which serve as potential prey." (Letter to State Director, Wyoming, BLM, dated July 14, 1983, at 3).

FWS, therefore, recommended that BLM require appellant to attach orange spherical markers to the powerline and use reflective line in order to increase line visibility, not engage in construction activities within 1 mile of any active eagle nest sites from Jan. 1 to Aug. 1, and minimize or avoid disturbance of riparian zone vegetation and removal of large trees. Id. at 4.

^{5/} Nelson was employed by appellant to coordinate the design of its powerline in order to avoid an adverse impact on raptors. See letter to Jackson Hole Alliance for Responsible Planning, from appellant, dated May 20, 1981.

stated that the proposed right-of-way is "not likely to significantly affect the continued existence of the Bald Eagle in this area" because raptor perches would eliminate the potential for electrocution, aerial cable markers would "minimize the likelihood of collision with the line," proposed construction is not in the immediate proximity of known nest sites and the line route was selected to minimize the number of trees needed to be cleared or trimmed.

The land report also analyzed the visual impact of the proposed right-of-way. The report noted that the area is a "high recreational use area," used "for floating, fishing and general water craft travel" (Environmental Assessment at 3). The report concluded that the proposed right-of-way would likely "decrease the quality of recreational experience," by affecting the scenic quality of the area. *Id.* The report included a portion of the Environmental Assessment (EA) for the Teton-Jackson 115,000-volt electric transmission line, dated December 1974, which assessed the environmental impact of a powerline previously proposed by appellant, which would have crossed the Snake River downriver from the presently proposed powerline. The EA stated at page 60: "A survey made by the University of Wyoming (Survey of Attitudes Toward Land Use in Teton County, Wyoming, 1974) found that 'The most positive aspect of life in Teton County, according to the survey's respondents, was the scenic beauty/environment of the area.'" The report also included a portion of the draft environmental impact statement for the Jackson Wastewater Treatment System, dated May 1977, which stated at pages II-11 to II-12:

Preserving the aesthetic and visual characteristics of Jackson is a prime concern for most of the area's residents along with the federal and state agencies operating in the area. The questionnaire distributed through the Comprehensive Planning Study to survey desires and needs of the resident population concerning the major land use and development issues in the County revealed that over eighty percent of those responding felt that the preservation of scenic values should take precedence over private development rights.

The land report concluded that if aerial cable markers were used to mark the proposed powerline, the scenic quality of the area would be impaired and if the markers were not used, there would be an increased probability of loss of threatened and endangered species (Environmental Assessment at 5).

In his June 1981 decision, the Area Manager, Pinedale Resources Area, Wyoming, BLM, denied appellant's right-of-way application based on the analysis contained in the land report.

In its statement of reasons for appeal, appellant contends that the proposed powerline will not result in a significant adverse affect on the scenic quality of the area because the poles would be placed against a "camouflage background of trees" and a nonreflective conductor would be used. 6/

6/ Appellant refers to a memorandum, dated Sept. 10, 1981, from the State Director, Wyoming, BLM, to the District Manager, Rock Springs District, Wyoming, BLM, which recommended approval of appellant's right-of-way application. However, the memorandum stated that "aerial cable markers constitute the most significant visual impact of the project" and recommended that they not be used.

Appellant also notes that usage of the river at this point is minimal because the river is "wide, slowmoving except during high water," ^{7/} and that the pastoral nature of the setting could easily change if surrounding private land is developed. Appellant also points out that even if this portion of the river had been designated a wild and scenic river, section 10(a) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1281 (1982), only provides that

[e]ach component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values." [Emphasis added.]

Section 1281(a) goes on to state that: "In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archaeologic, and scientific features." In addition, section 13(g) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1284 (1982), provides that the Secretary of the Interior may grant rights-of-way "upon, over, across, or through any component of the national wild and scenic rivers system."

With respect to the potential for collisions with the proposed powerline, appellant notes that Nelson reported that this should not be considered a serious problem and that no collisions have occurred at two powerline crossings downriver "in the vicinity of the Wilson Bridge."

By order dated September 14, 1983, Howard and Cara Stirn, owners of the R Lazy S Ranch, were allowed to intervene in this proceeding. In their subsequent brief, intervenors contend that the proposed powerline would disturb the natural and unspoiled setting of the area, which is valued by floaters, fishermen, and hikers who use this section of the river. Intervenors argue that the line would be clearly visible and that it is irrelevant to the question of visual impact how many people use this section of the river. In addition, intervenors assert that the threat to raptors listed as threatened or endangered is well documented. Finally, intervenors note that either of the suggested alternatives would provide adequate electrical service. ^{8/}

^{7/} In a supplemental statement of reasons, appellant states that the minimal use of the river by floaters is due to the proximity of the southern boundary of the Grand Teton National Park, restrictions on commercial floaters in the park and limited access to this section of the river. Appellant notes that it observed only a total of five rafts or boats in the early afternoon hours of Aug. 24 and 26, 1983.

^{8/} Intervenors also point out that appellant should have known when it originally built the Spring Gulch line of the anticipated future demand for electrical power. We question intervenor's suggestion of appellant's omniscience in view of the fact that the Spring Gulch line was built in 1951. Intervenors also assert that appellant has underestimated somewhat its costs under the adopted alternative. We must agree. While appellant stated in its application that private rights-of-way could be secured at no cost, it apparently failed to take into account that intervenors would not willingly grant an easement and, thus, would be entitled to its fair market value in a condemnation proceeding.

[1] There is nothing in the applicable statutes which precludes the granting of a right-of-way pursuant to section 501 of FLPMA, supra. Section 7(a)(2) of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1536(a)(2) (1982), requires that Federal agencies ensure that actions taken by them are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat." The record in this case indicates that the proposed right-of-way is not likely to jeopardize the continued existence of either the bald eagle or peregrine falcon. Moreover, nothing in the Bald and Golden Eagles Protection Act, as amended, 16 U.S.C. § 668 (1982), precludes the granting of appellant's proposed right-of-way. The Act is concerned principally with criminal sanctions directed at certain enumerated actions, including taking and sale, with respect to bald and golden eagles. Finally, in view of the fact that the relevant section of the Snake River was not designated a wild and scenic river, the Wild and Scenic Rivers Act, supra, is not applicable.

Nevertheless, under section 501 of FLPMA, supra, approval of a right-of-way by the Secretary of the Interior is a "wholly discretionary matter." E.g., William A. Sigman, 66 IBLA 53, 55 (1982); Nelbro Packing Co., 63 IBLA 176, 185 (1982). It is well established that BLM may use its discretionary authority to protect environmental and other land use values, including endangered and threatened species and the scenic quality of an area. E.g., Anita Robinson, 71 IBLA 380 (1983); Bumble Bee Seafoods, Inc., 65 IBLA 391 (1982); Placid Oil Co., 58 IBLA 294 (1981). ^{9/} However, we have consistently held that rejection of a right-of-way application will be affirmed where the record shows the decision to be based on a reasoned analysis of the factors involved, made with due regard for the public interest. E.g., Anita Robinson, supra at 382. Nelbro Packing Co., supra at 185. "There is no question that protection of a species of animal * * * is in the public interest." Placid Oil Co., supra at 301. The record here clearly reflects such a reasoned analysis with due regard for the public interest.

The first impact of the proposed powerline addressed by BLM was its potential effect on the raptor population of the area, particularly the bald eagle and peregrine falcon. BLM concluded that there would be an increased probability of collision with the line and, thus, a certain incidence of raptor mortality, which, while it would not jeopardize the continued existence of an endangered or threatened species, was significant. The record further indicates that the attaching of aerial cable markers to the line would minimize the likelihood of collision with the line. The record is unclear as to whether the likelihood is thereby reduced to an acceptable level. There is no suggestion that there would be no remaining danger to the birds. In its July 14, 1982, section 7 consultation letter at page 4, the FWS stated only that orange spherical markers attached to the lines would "increase their visibility to eagles and falcons." The conclusion is that whatever the

^{9/} The case of Placid Oil Co., supra, involved a question of oil and gas leasing, but is equally applicable here because it also concerned the exercise of BLM's discretionary authority, although under section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1982). See Udall v. Tallman, 380 U.S. 1, 4 (1963).

benefits from attaching aerial cable markers, such markers are considered necessary if BLM were to grant the right-of-way.

Appellant does not dispute that the bald eagle and peregrine falcon may collide with powerlines. Rather, it characterizes the problem as insignificant. However, this constitutes merely a disagreement with BLM and does not establish error in BLM's analysis. 10/ We must conclude that by granting the right-of-way, there would be an increased probability of collision with the line, and that the attachment of aerial cable markers would minimize this risk.

The attachment of aerial cable markers, however, results in increased visibility of the line, which involves the second impact addressed by BLM, i.e., the line's effect on the scenic quality of the area. The concept of scenic quality is difficult to define. However, it is made up of an amalgam of particular elements which combine to produce an overall effect. As such, it has value. The degree of that value is inherently subjective. Appellant argues that the scenic quality of the area of the proposed crossing would not be viewed by many people, and that their view would be limited in duration. To the extent that the scenic quality of the area has unquestionable and universally recognized value, it is irrelevant how many people may be expected to view the area or how long they might be exposed to the distracting structure. It has also been suggested that the surrounding land may be developed and that, presumably, degradation of the scenic quality of the area is inevitable. Such degradation is not necessarily inevitable. Moreover, the area must be viewed in its present configuration. If BLM seeks to preserve the status quo by denying the proposed crossing, we are not in a position to override that determination based on speculation and conjecture about future development.

Appellant also argues that its line would not be a significant intrusion. However, appellant admits that the line, even if nonreflective, would be visible for some distance and does not dispute the extreme visibility of the aerial cable markers. Appellant's argument constitutes a mere disagreement with BLM and does not establish error in BLM's analysis. 11/

10/ Appellant noted that no collisions had occurred with two powerlines downriver in the vicinity of the Wilson Bridge. This might easily be explained by the presence of the bridge, which may have kept birds away from the general area. See Appellant's Detail Map No. H 9, dated December 1973. In a reply to the intervenor's brief, appellant also argued that BLM, in its biological assessment (see note 3) had overstated the threat of collision deaths caused by powerlines. Appellant quoted at length from the "Kroodsma 1978" study to the effect that electrocution, may have "accounted for some, if not most, of these 'collision' deaths" (Response at 10). The study further stated: "Electrocution may have been mistakenly omitted as the cause of death because of the lack of obvious electrocution burns. Thus, it appears that collision with lines may not account for as large a fraction of mortality as the literature reports." Id. While these statements call into question the degree of the danger posed to raptors by potential collision with powerlines, we conclude that it, nevertheless, provides a basis for BLM to act to protect such birds until a definite conclusion is made that powerlines pose an acceptable risk.

11/ In William A. Sigman, supra, we set aside a BLM decision rejecting a right-of-way application for a road, partly on the basis of its visual impact.

In deciding whether to approve appellant's proposed right-of-way, BLM was required to balance the competing interests. On the one hand was the interest of appellant in avoiding capital expenditure and improving the reliability of service to the golf course and airport areas. The savings would ultimately benefit the local ratepayers. On the other hand was the interest of the public at large in preserving the scenic value of the area and the local population of raptors listed as endangered and threatened. Moreover, there is no question that feasible alternatives were available. Cf. Patrick O. Brown, 55 IBLA 336 (1981). We cannot say that BLM failed to adequately weigh these interests or that it failed to take relevant factors into account. Accordingly, we conclude that BLM properly denied appellant's right-of-way application for the foregoing reasons, and because appellant has not shown a "sufficient reason" to disturb BLM's decision. See Anita Robinson, *supra*; Stanley S. Leach, 35 IBLA 53, 55 (1978); Jack M. Vaughn, 25 IBLA 303, 304 (1976).

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

R. W. Mullen
Administrative Judge

fn. 11 (continued)

We concluded that, although the road would be visible, "it is hard to perceive how it could attract attention in view of the existing transmission lines, towers, and access roads." *Id.* at 55. The present case is inapposite in the sense that the area of the proposed crossing is pristine. See Appellant's Exh. D, Decision Appeal Document.

